

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

MARK WHALING,)	
)	
Plaintiff,)	
v.)	C.A. No. 08-210 Erie
)	
ERIE COUNTY PRISON, et al.,)	
)	
Defendants.)	

AMENDED MEMORANDUM JUDGMENT ORDER

Plaintiff's civil rights complaint was received by the Clerk of Court on July 24, 2008 and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation, filed on November 30, 2009 [29], recommends that: (1) Defendants Hillkirk's and Patty Doe's Motion to Dismiss Plaintiff's Amended Complaint [22] be granted, (2) the Motion to Dismiss Amended Complaint filed on behalf of Defendants Erie County Prison, Veshecco, Wilson, Olowin, Aganello, Ricci, Ames, Owens, Johnson, Yeane, Kremenik, Danowski, Loftus, Parks, and Damper (collectively, the "Erie County Prison" Defendants) [25] be granted, and (3) the case be marked as closed. The parties were allowed ten (10) days from the date of service in which to file objections. Plaintiff's objections [32] were filed on January 20, 2010.

After de novo review of the Complaint and the documents in the case, together with the Report and Recommendation and Plaintiff's objections thereto, the Court concludes that it will adopt the Report and Recommendation in part. Specifically, the Court declines to adopt the Report and Recommendation insofar as it relates to the Plaintiff's Eighth Amendment claim asserting cruel and unusual punishment based on

the Erie County Prison Defendants' utilization of the restraint chair, as the Court finds that there are material issues of fact which render summary judgment inappropriate as to that claim. In addition, the Court concludes that Plaintiff's state law claims are barred by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §§ 8541, *et seq.* However, the Court will adopt the Report and Recommendation in all other respects. Accordingly, the following order is entered:

AND NOW, this 4th Day of February, 2010,

IT IS ORDERED that Defendants Hillkirk and Patty Doe's Motion to Dismiss Plaintiff's Amended Complaint [22] be, and hereby is, GRANTED. Inasmuch as said motion was previously converted by the Magistrate Judge to a motion for summary judgment, JUDGMENT is hereby entered in favor of Defendants Hillkirk and Patty Doe and against Plaintiff Mark Whaling.

IT IS FURTHER ORDERED that the Motion to Dismiss Amended Complaint filed on behalf of the ECP Defendants [25] be, and hereby is, GRANTED in part and DENIED in part as follows:

(1) said motion will be DENIED as to the Plaintiff's Eighth Amendment claim asserting cruel and unusual punishment relative to the Erie County Prison Defendants' utilization of the restraint chair; and

(2) said motion will be GRANTED as to Plaintiff's state law claims inasmuch as Defendants are entitled to immunity from such claims under Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §§ 8541, *et seq.*, and none of the statutory exceptions to immunity apply to such claims; and

(3) said motion will be GRANTED in all other respects.

Inasmuch as the Magistrate Judge previously converted said motion to a motion for summary judgment, JUDGMENT is hereby entered in favor of the Erie County Prison

Defendants and against Plaintiff Mark Whaling as to all claims, save Plaintiff's Eighth Amendment claim asserting cruel and unusual punishment relative to the Defendants' utilization of the restraint chair.

The Report and Recommendation of Magistrate Judge Baxter dated November 30, 2009 [29] is adopted, in part, as the opinion of this Court to the extent set forth herein.

IT IS FURTHER ORDERED that the terms of this Order supersede those set forth in this Court's previous order of February 3, 2010, and the Court's Order of February 3, 2010 is hereby VACATED.

s/ Sean J. McLaughlin

SEAN J. McLAUGHLIN
United States District Judge

cm: all parties of record.
U.S. Magistrate Judge Susan Paradise Baxter